STATE OF MICHIGAN

COURT OF APPEALS

LISA L. ZEZULA, Plaintiff-Appellee,	UNPUBLISHED March 4, 2014
v	No. 313080 Wayne Circuit Court
CITY OF LINCOLN PARK, Defendant-Appellant.	LC No. 11-009928-NO

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right an order denying its motion for summary disposition of plaintiff's negligence claim on the basis of statutory governmental immunity. We affirm.

Defendant first argues that plaintiff failed to establish a material factual dispute regarding whether the street was in reasonable repair so that it was reasonably safe and convenient for public travel, and that plaintiff did not provide facts to show that defendant was on notice of the defect, as required by statute.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). MCR 2.116(C)(7) was the proper court rule when deciding a motion seeking dismissal under MCL 691.1402 and MCL 691.1403, which are part of the governmental immunity statute.

This Court reviews de novo the denial of a motion for summary disposition under MCR 2.116(C)(7). *Plunkett v Dep't of Transportation*, 286 Mich App 168, 180; 779 NW2d 263 (2009). To defeat such a motion, the plaintiff must allege facts stating a claim under an exception to governmental immunity. *Id.* When reviewing a motion for summary disposition on the basis of governmental immunity, this Court accepts the plaintiff's well-pleaded factual allegations as true and construes them in the plaintiff's favor, "unless the movant contradicts such evidence with documentation." *Id.* "Neither party is required to file supportive material; any documentation that is provided to the court, however, must be admissible evidence." *Id.* "If there are no facts in dispute, whether the claim is statutorily barred is a question of law for the court." *Braverman v Garden City Hosp*, 272 Mich App 72, 78; 724 NW2d 285 (2006) (quotation marks and citation omitted), superseded in part on other grounds 275 Mich App 705 (2007). However, if there are material facts in dispute or reasonable minds could differ

regarding the "legal effect of those facts," then summary disposition should not be granted. *Dybata v Wayne Co*, 287 Mich App 635, 637-638; 791 NW2d 499 (2010).

Pursuant to the Governmental Tort Liability Act, "a governmental agency," including municipalities, "is shielded from tort liability if it is engaged in the exercise or discharge of a governmental function." *Roby v Mount Clemens*, 274 Mich App 26, 29; 731 NW2d 494 (2006). One exception to governmental immunity is enumerated in MCL 691.1402,[1] which outlines the highway exception:

> (1) [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. . . .

A highway "is statutorily defined as a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." MCL 691.1401(c);[2] *Roby*, 274 Mich App at 30. At issue is whether there is a material factual dispute regarding whether defendant maintained Marion Street in reasonable repair such that it was safe and fit for travel, as it is required to do by statute. *Braverman*, 272 Mich App at 78.

The duty to maintain the highway in "reasonable repair . . . simply refers to the duty to maintain and repair, and states the desired outcome of reasonably repairing and maintaining the highway," but the highway need not be perfectly safe. *Wilson v Alpena v Co Road Comm*, 474 Mich 161, 167; 713 NW2d 717 (2006). A highway is not maintained in reasonable repair when there is a "persistent defect in the roadway rendering it unsafe for public travel at all times . . ." that has not been repaired by a governmental agency that has notice of the defect. *Plunkett*, 286 Mich App at 190. This rule is applicable to injuries to pedestrians walking on a highway that are caused by a defect in the roadway. See *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 162-163; 615 NW2d 702 (2000).

Plaintiff presented sufficient evidence creating a factual dispute regarding whether Marion Street was maintained in reasonable repair such that it was reasonably safe and fit for travel. The evidence, consisting of photographs and deposition testimony, establishes that the spike was protruding from the street. One of defendant's employees testified that the spike rose

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[1] MCL 691.1402 was amended by 2012 PA 50, effective March 13, 2012. Because the events at issue occurred on May 6, 2011, prior to the amendment, the former text of MCL 691.1402 applies.

[2] MCL 691.1401(c) was added by 2012 PA 50, effective March 13, 2012; however, "highway" was previously defined nearly identically in subsection (e) prior to the 2012 amendments. See *Roby*, 274 Mich App at 30.

approximately ½ of an inch above street level, though one photograph appears to show it raised approximately ¾ of an inch above street level. Regardless, it is undisputed that the spike was protruding at least ½ inch above the street level, which creates a material factual dispute as to whether that condition establishes that defendant did not keep the roadway in reasonable repair such that it was reasonably safe and convenient for public travel. Accordingly, we hold that defendant was not entitled to judgment as a matter of law.

Defendant correctly argues that, pursuant to MCL 691.1403, it is only liable for injuries for which it had notice:

> No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.

However, knowledge can be either actual or constructive. *Plunkett*, 286 Mich App at 183. In general, "whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Banks v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007).

Plaintiff argues that plaintiff's daughter notified local police and her garbage collectors of the exposed spike in the road. However, this Court has held that notifying a local police agency does not constitute adequate notice, in this context, because the "police department was neither the agency which had jurisdiction over the highway nor an agency which had contracted to maintain that highway." *Schroeder v Dep't of Transportation*, 159 Mich App 396, 399; 405 NW2d 884 (1987). Thus, plaintiff did not on these facts establish actual knowledge to trigger defendant's duty.

However, plaintiff has established a factual dispute regarding whether knowledge could have been conclusively presumed because different testimony was offered regarding whether the exposed spike was present for over 30 days. As the Supreme Court has noted, the "Legislature has [ ] indicated that knowledge and time enough to repair are conclusively presumed when the defect has been readily apparent to an ordinarily observant person for 30 days or longer before the injury." *Wilson*, 474 Mich at 169. Based on photographs provided by plaintiff, the spike was noticeably protruding from the ground and was surrounded by cracks and potential vegetation. Thus, it is likely that the spike was readily apparent to an ordinarily observant person. Indeed, plaintiff's daughter testified that the spike had been exposed since she moved into her house on that road approximately one year prior. On the other hand, a city employee testified that, based on his knowledge and experience, the spike likely had not been exposed for more than 30 days. Again, based on these differing opinions, there is a factual dispute regarding whether defendant had constructive notice of the defect, and thus, the lower court properly denied defendant's motion for summary disposition.

We also reject defendant's argument that summary disposition should have been granted because plaintiff was unable to establish, beyond mere speculation and conjecture, that her injury was sustained "by reason of" defendant's breach of its duty.

MCL 691.1402(1) provides, in part, that "[a] person who sustains bodily injury or damage to his or her property *by reason of* failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency." (Emphasis added.) The element at issue here, causation, can be established by circumstantial evidence, but this proof "must facilitate reasonable inferences of causation, not mere speculation" or conjecture. *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994). The Court defined conjecture as "simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference," noting that it is not sufficient "to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Id*. at 164-165 (quotation marks and citation omitted). This Court has been clear that "if the evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established." *Karbel v Comerica Bank*, 247 Mich App 90, 98; 635 NW2d 69 (2001) (quotation marks and citation omitted).

Plaintiff established a material factual dispute regarding whether her fall was "by reason of" defendant's breach of duty, as required by MCL 691.1402. Plaintiff correctly distinguishes *Stefan v White*, 76 Mich App 654, 657; 257 NW2d 206 (1977), relied upon by defendant, where that plaintiff neither recalled what caused her fall, nor recalled seeing or feeling anything. On the contrary, here, plaintiff testified that she felt her foot catch something on the ground, and upon inspection of the immediate vicinity, discovered the exposed spike in an otherwise flat area. Plaintiff did not discover the spike at a later time and then conclude the spike must have caused her fall. Instead, it is a reasonable inference, and a jury could determine, that it is more likely than not that plaintiff tripped on the spike, because she felt her foot hit an object and then tripped on an otherwise flat surface, and she immediately observed the exposed spike in the area she had tripped.[3] Based on this factual dispute, defendant was not entitled to judgment as a matter of law, and defendant's motion for summary disposition was properly denied.

Affirmed.

Having prevailed in full, plaintiff may tax costs. MCR 7.219(A).

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Riordan

[3] Plaintiff's citation to medical records regarding her injuries caused by the fall are irrelevant to the issue of defendant's potential liability under MCL 691.1402.